



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: AUGUST 26, 2022

IN THE MATTER OF:

Appeal Board No. 610030

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination (including September 16, 2019) holding . (herein the "employer" or "Uber") liable for tax contributions effective 2nd quarter 2019 based on the independent contractor misclassification of ME (herein the "claimant") and any other individual similarly employed as a courier deemed to be in covered employment. (Appeal Board No. 610030 and)

The Department of Labor deemed the claimant to be an employee with credited remuneration from the employer regarding the claim for benefits effective July 22, 2019. (Appeal Board No. 610031 and 319-04337)

Requesting a hearing, the employer contends that the claimant and all other individuals similarly employed performed services as independent contractors. The Administrative Law Judge held a combined telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the employer and of the Commissioner of Labor. By combined decisions filed January 02, 2020, the Judge sustained the employer's objection and overruled the initial determination.

The Commissioner of Labor appealed the Judge's combined decisions to the Appeal Board. The Board considered the arguments contained in the written statements submitted on behalf of the Commissioner and of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Uber Technologies, Inc. maintains a digital platform accessible through its Uber Eats mobile phone application (the "App") to provide food delivery services. This platform connects an individual user (the "User") to a restaurant (pick-up location) to a delivery provider (the "courier") to the User or Delivery Recipient (drop-off location). Uber negotiates and contracts a marketplace fee with restaurants seeking to participate in Uber's Delivery Services. For example, after Uber charges and collects from a User the retail cost of \$10 for the food purchase, plus a delivery fee, Uber pays the restaurant \$7 and retains the \$3 discount as Uber's marketplace fee. Uber also collects a service fee from the courier.

An authorized courier must undergo an onboarding process that includes registering for an account by providing Uber with some basic information and documentation (e.g., name, phone number, email address, social security number, driver's license, vehicle registration, and auto insurance), and granting Uber permission to conduct a background check and driving history check. A courier must sign Uber's Technology Services Agreement and the Addendum to Technology Services Agreement (collectively herein as "Agreement"). The Agreement, identifying the courier as an independent contractor, provides the following:

- * The courier ("you" or "your") shall maintain Uber's Provider ID in confidence and not share your Provider ID with any third party [§ 2.1]
- * You shall follow the User instructions for pickup and drop-off details (e.g., the location within the building address to pick-up/drop-off a package, etc.) [§ 2.2]
- * You shall wait a reasonable amount of time for a User to appear at the requested pick-up or drop-off location [§ 2.2]
- * You shall not to contact any User or Delivery Recipient, or use any User's personal data for any reason other than for the purposes of fulfilling Delivery Services [§ 2.2]
- * Uber will provide you with certain User Information, Delivery Recipient Information, and User instructions via the App (e.g., the User's first name and the pickup and drop-off location of the package to be delivered) [§ 2.2]
- * Uber may provide certain information about you to the User and Delivery

Recipient (e.g., the courier's first name, contact information, photo, location, and transportation method) [§ 2.2]

* Uber may release your contact and/or insurance information to a User or Delivery Recipient upon a reasonable request (e.g., in connection with an accident) [§ 2.3]

* You may accept or decline or ignore a delivery request, and cancel an accepted request, subject to Uber's then-current cancellation policies [§ 2.4]

* Uber retains the right to deactivate or otherwise restrict you from accessing or using the App in the event of a violation of this Agreement, your disparagement of Uber, fraudulent activity, or your act or omission that causes harm to Uber's brand, reputation or business [§ 2.4]

* Uber may prompt a User and/or Delivery Recipient to rate you, with an option to provide comments or feedback about you [§ 2.5.1]

* Uber will prompt you to rate the User, with an option to provide comments or feedback about the User, which shall be provided in good faith [§ 2.5.1]

* You must maintain a "Minimum Average Rating", which is an average rating that exceeds the minimum average acceptable rating established by Uber for your Territory, which Uber may update from time to time in its sole discretion [§ 2.5.2]

* If your average rating falls below the Minimum Average Rating, Uber will notify you and may provide you, in Uber's discretion, a reasonable opportunity to raise your average rating above the Minimum Average Rating [§ 2.5.2]

* If you do not increase your average rating above the Minimum Average Rating within the reasonable time period provided, Uber may deactivate your access to the App and the Uber Services [§ 2.5.2]

* If you do not wish to accept User requests for Delivery Services for a period of time, you shall log off of the App [§ 2.5.2]

* Uber and its Affiliates reserve the right to use, share and display (and edit) your, User and Delivery Recipient ratings and comments in any manner in connection with Uber's business of Company and its Affiliates without

attribution to you or your approval [§ 2.5.3]

* If you elect to use an Uber phone ("Device"), Uber will supply you with an Uber Device and provide the necessary wireless data plan for such Device, provided (1) that Uber will require reimbursement from you for the costs associated with the wireless data plan of each Device and/or request a deposit for each Device; (2) that Uber Devices may only be used for the purpose of enabling your access to the Uber Services; and (3) Uber Devices may not be transferred, loaned, sold or otherwise provided in any manner to any party other than you [§ 2.6.1]

* Uber may obtain your geo-location information while the App is running [§ 2.7]

* Uber will display your approximate location to the User and Delivery Recipient before and during the provision of Delivery Services to the User [§ 2.7]

* Uber and its Affiliates may monitor, track and share with third parties your geo-location information obtained by the App and Device for safety and security purposes [§ 2.7]

* At all times, you shall hold and maintain a valid applicable driver's license [§ 3.1]

* At all times, you shall provide Delivery Services with professionalism, service and courtesy consistent with industry standards for the delivery services industry [§ 3.1]

* Uber may conduct background and driving record checks from time to time in order to qualify to provide, and remain eligible to provide, Delivery Services [§ 3.1]

* Uber reserves the right to deactivate or otherwise restrict you from accessing or using the App or the Uber Services if you fail to meet the requirements set forth in this Agreement [§ 3.1]

* At all times, you shall have properly registered and licensed to operate a

motor vehicle that is owned or leased by you, or otherwise in your lawful possession that is suitable for performing the Delivery Services and that is maintained in good operating condition [§ 3.2]

* You must provide Uber with written copies of all such licenses, permits, approvals, authority, registrations and certifications, prior to your provision of any Delivery Services, and as they are renewed [§ 3.3]

* Uber may review such licenses, permits, approvals, authority, registrations and certifications from time to time, and your failure to provide or maintain any of the foregoing shall constitute a material breach of this Agreement [§

3.3]

* You are entitled to a Delivery Fee for each Delivery that you provide, where "Delivery Fee" is a flat pickup fee and/or drop off fee plus a per mile rate and/or a per minute rate, provided that the per mile rate may be based on the most efficient route (and not actual miles travelled) and the per minute amount may be based on estimated time between arrival at the restaurant to drop-off to the delivery recipient, including expected wait-time at pickup, expected travel time, and expected wait-time at drop-off (and not actual time) [Addendum § 4.1]

* Delivery Fee formula vary by Territory and are provided to you electronically for that Territory. Accordingly, the calculation of your Delivery Fee may vary depending on factors such as local supply and demand and may be adjusted in our discretion based on local market factors or by a percentage that is determined when you entered into the Agreement. We will provide you with notice of any change to any Delivery Fee calculations, including applicable per mile and/or per minute rates and flat fee amounts, as applicable, and by continuing to use the Uber Services, you are deemed to accept these changes [Addendum § 4.1]

* The User will pay Uber an amount that includes applicable fees, taxes and surcharges (collectively, the "User Payment"), and any gratuity, which is at the User's sole discretion [Addendum §4.1]

* Uber will remit to courier the Delivery Fees and applicable tolls on at least a weekly basis, less any amounts being deducted from your Delivery Fees with any party (such as vehicle financing or lease payments, or mobile device

charges) [Addendum § 4.1]

* Uber may adjust or, in more serious situations, cancel or refund in its entirety any Delivery Fee, User Payment and/or applicable taxes and fees [Addendum § 4.1]

* If a User cancels their Delivery prior to your arrival at the pickup location, Uber may charge that User a Cancellation Fee on your behalf, and in this case the Cancellation Fee will be treated the same as a User Payment for completed Deliveries [Addendum § 4.1]

* At the end of a Delivery, Uber will electronically deliver a receipt, which includes a breakdown of amounts charged and certain information about you and the Delivery (including but not limited to your details) [Addendum § 4.2]

* You will pay Uber a "Service Fee" that is on a per-Delivery basis calculated by Uber [§ 4.3 Addendum]

* Uber may terminate this Agreement or deactivate your Provider ID immediately, without notice, in the event you no longer qualify, under applicable law or Uber standards and policies, to provide Delivery Services [§

12.2]

Once logged on to the platform, the courier receives a nearby delivery offer, which includes the pick-up location and delivery fee. Couriers are free to accept or decline a delivery offer and may reject a delivery even after accepting it without penalty. Uber provides the courier with financial incentives, including additional payments if the courier performs many deliveries, and boost payments (e.g., twice the normal delivery fee) when there are not enough couriers in specified territories. If Uber provides Users with a coupon for free delivery, the User does not pay the courier's delivery fee, which is paid by Uber. Users are prompted to rate the courier with a thumbs-up or thumbs-down. If the courier's average rating falls below 88 percent, Uber may revoke the courier's access to the platform. Uber's platform automatically handles customer feedback and complaints. If a complaint triggers certain key words, the platform will refer the complaint to an Uber employee, e.g., Uber may offer a \$5 credit to a User to satisfy a complaint.

Couriers are prohibited from using a substitute courier. Couriers provide

their own smartphone devices and motor vehicles while bearing all the associated expenses (e.g., data charges, gasoline, and maintenance). Couriers are not prohibited from simultaneously using competitors' platforms (e.g., Postmates, DoorDash and Caviar) Uber records the driving routes while the courier is logged into the platform. Uber does not direct the use of any delivery route or impose a delivery deadline.

On April 19, 2019, the claimant, after completing all the onboarding requisites, executed Uber's Agreement and commenced work as an authorized courier pursuant to the foregoing terms and conditions. She worked in Buffalo, New York and has maintained an active account on the Uber platform through the time of the hearing. She received weekly payments from Uber regarding the earned Delivery Fees. Uber issued the annual IRS 1099 forms.

OPINION: The credible evidence establishes that Uber exercises sufficient supervision, direction, or control over the couriers to establish an employment relationship. Significantly, the Agreement set standards for the courier's performance, including the requirement to wait a reasonable amount of time for a User, to maintain an average rating above Minimum Average Rating established by Uber, to work with professionalism, service and courtesy consistent with industry standards, and to have a "suitable" mode of transportation and to have it "maintained in good operating condition". The Agreement also controls numerous other aspects surrounding the courier's work, which includes: prohibiting the use of a substitute based on the mandate to keep confidential the courier's ID; controlling what, when, and to whom the User or courier information is shared; monitoring, tracking, and sharing the courier's geo-location information with the User and other third-parties; directing to rate and comment on the User and to logoff of the App if not working; setting and collecting the charges from the User; reserving the right to change the delivery fee calculations at any time; reserving the right to adjust, cancel or refund to the User the delivery fee for various reasons; paying the courier on a weekly basis, less any vehicle financing or lease payments, or mobile device charges; setting and collecting from couriers a service fee on each delivery; and reserving the right to share courier's personal information (including background check information) under various conditions. The Agreement further unilaterally controls the courier's continued eligibility to provide services (App access deactivation) in the following manner: Uber reserved the right to use, share, display, and edit ratings and comments provided Users; Uber may choose to provide the courier with a reasonable opportunity to raise the average rating above the Minimum

Average Rating; Uber reserved the right to conduct at any time background and driving record checks; and Uber reserved the right to terminate the Agreement without notice whenever the courier no longer qualifies under Uber's standards or policies. Furthermore, the Agreement limits the courier's ability to work independent of Uber due to (1) the prohibition to contact Users for any reason other than their work via the App, and (2) the prohibition to have another business activity that may interfere with their completion of delivery services. Finally, Uber requires the courier to be properly vetted; Uber provides the courier with financial incentives (additional payments and boost payments); and Uber fields all complaints. See, *Matter of Vega (Postmates)*, 35 NY3d 131 (2020); *Matter of Lowry (Uber Tech., Inc.)*, 189 AD3d 1863 (3d Dept. 2020); *Matter of Hossain (Groundanywhere LLC)*, 205 AD3d 1282 (3d Dept 2022); Combined Appeal Board Nos. 605911 & 605920; Combined Appeal Board Nos. 603351 & 603362; Appeal Board No. 603258; and Combined Appeal Board Nos. 596722 & 596725, 596723 & 59676, and 59674 & 59677.

Considering *Matter of Vega* and *Matter of Lowry*, the cases relied on by Uber are not controlling. Significantly, in *Vega*, the Court noted that although "the couriers retain some independence to choose their work schedule and delivery route", it "does not mean that they have actual control over their work or the service Postmates provides its customers; indeed, there is substantial evidence for the Board's conclusion that Postmates dominates the significant aspects of its couriers' work by dictating to which customers they can deliver, where to deliver the requested items, effectively limiting the time frame for delivery and controlling all aspects of pricing and payment" (*Vega*, *supra*, at 139). Similarly, we find extensive control in the case at hand.

Next, Uber contends that the prior Uber decisions (*Matter of Lowry* [Uber Tech., Inc.], 189 AD3d 1863 [3d Dept. 2020], and Combined Appeal Board Nos. 596722 & 596725, 596723 & 596726, and 596724 & 596727) are not controlling because (1) those drivers worked under different contracts and provided different services (passenger transportation versus food delivery), (2) the practices described for those drivers effective 1st quarter 2014 do not reflect the record evidence in this case for couriers providing services effective 2nd quarter 2019, and (3) the prior decisions were based, in part, on a variety of regulations that governed the services being performed while there is no evidence of such regulations in this case. As to the first two contentions, we note that the record does not sufficiently distinguish the instant courier from that of the drivers in the prior Uber cases, and, if

anything, the Agreement in this case is not significantly different from the contracts in the prior Uber cases. As to the third contention, the Board is mindful that the requisite level of supervision, direction or control must sufficiently exceed any regulations governing the conduct of the instant couriers (Matter of Leazard [TestQuest Inc.], 74 AD3d 1414 [3d Dept 2010]). Here, the record is devoid of any regulation governing the instant couriers. Accordingly, we find and conclude that Uber's contentions are without merit and that these prior Uber cases are controlling herein.

We distinguish both Matter of Walsh (TaskRabbit Inc.), 168 AD3d 1323 (3d Dept 2019) and Matter of Hawkins (A Place for Rover Inc.), 198 AD3d 1120 (3d Dept 2021). In Walsh, the client selected the service provider (tasker) who bid on odd jobs posted by the client who communicated directly with the tasker regarding the job specifications and scope of work without TaskRabbit's monitoring of services. In Hawkins, the clients similarly selected the service provider (dog sitter) who posted their services online and who communicated directly with client regarding the job specifications and scope of work without Rover's monitoring the ongoing services or the location of the provider. Unlike the online platform in the case at hand, TaskRabbit and Rover exercised no control over the manner in which the service providers performed their work and all communications regarding the job were between the client and the service provider. Accordingly, we find and conclude that Walsh and Hawkins are not controlling herein. Under the entire circumstances, the Board holds Uber liable for contributions based on the remuneration paid to the claimant and all other individual couriers similarly situated as employees of Uber under the Unemployment Insurance Law.

DECISION: The combined decisions of the Administrative Law Judge are reversed.

The initial determination, holding . liable for tax contributions effective 2nd quarter 2019 based on the independent contractor misclassification of the claimant and any other individual similarly employed as a driver/courier deemed to be in covered employment, is sustained.

(Appeal Board No. 610030 and)

The claimant is deemed to be an employee with credited remuneration from the employer.

(Appeal Board No. 610031 and 319-04337)

The employer's objection is overruled.

The employer is liable with respect to the decided issues.

RANDALL T. DOUGLAS, MEMBER